United Nations A/CN.9/SR.916

General Assembly

Distr.: General
14 July 2010

Original: English

United Nations Commission on International Trade Law
Forty-third session

Summary record of the 916th meeting
Held at Headquarters, New York, on Wednesday, 30 June 2010, at 3 p.m.

Chairperson: Ms. Sabo (Vice-Chairperson) (Canada)

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10-43075 (E)

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The meeting was called to order at 3.15 p.m.

Possible future work in the area of security interests (*continued*)

1. **Mr. Bazinas** (International Trade Law Division, Office of Legal Affairs) read out an oral report on intellectual property licensing:

> "1. The Commission next considered the topic of intellectual property licensing, a topic at the intersection of intellectual property and contract law. It was widely felt that the Commission did not have sufficient information to make a decision as to the desirability and feasibility of any work on that topic. The Commission, therefore, considered whether to request the Secretariat to prepare a desirability and feasibility study that would identify any concrete needs and suggest specific ways in which they could be addressed by a legal text to be prepared by the Commission with a view to removing any legal obstacles to intellectual property licensing practices hindering the development of international trade.
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> 2. Differing views were expressed as to whether the topic of intellectual property licensing fell within the mandate of the Commission and, as a result, whether the Commission could undertake any work on that topic. One view was that, to the extent that intellectual property licensing involved contract issues and formed an important part of international trade, it was within the mandate of the Commission. Another view was that intellectual property licensing was a purely intellectual property law topic that fell within the scope of work of other organizations, such as WIPO. After discussion, the Commission agreed that intellectual property licensing was an issue at the intersection of intellectual property and commercial law and thus, while it fell within the mandate of the Commission, any work by the Commission should be undertaken in cooperation with other organizations, such as WIPO.
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> 3. Differing views were also expressed as to the scope of any study to be prepared by the Secretariat. One view was that the study should examine the desirability and feasibility of work on various issues related to intellectual property licensing. It was stated that the outcome of the study should not be prejudged. In that connection, it was observed that the result of the study could well be that work was both necessary and possible on a narrow topic or on no topic at all. In addition, it was pointed out that the Secretariat had experience in the preparation of such studies in the context of a careful, open and considerate process, involving expert group meetings, colloquia and seminars, and had every reason to have confidence that that process would produce the best possible and broadly acceptable result for consideration by the Commission. Moreover, it was said that, as the study would have to be prepared within existing resources and other work had priority, the Secretariat would probably need to take some time to prepare it.
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> 4. Another view was that the study should examine a narrow topic related with secured transactions, such as, for example, whether licensee rights could be used as security for credit and if so, in which rights exactly and under which conditions. It was stated that, in the absence of any specific indication of a concrete need, no work was warranted of a broader scope. It was also observed that experience gained from work on intellectual property licensing at the national level suggested that such work was not desirable or feasible. In that connection, it was emphasized that issues arising with respect to patent licensing were different from those arising with respect to copyright licensing. It was also pointed out that even within the area of copyright licensing, the issues arising with respect to software licensing were different from those arising in the context of movie or music licensing. In addition, it was said that difficulties would be compounded at the international level in view of the wide divergences existing among the various legal systems. Some doubt was expressed as to whether that topic warranted any future work in particular in view of the work done by the Commission in the draft Supplement.
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> 5. After discussion, the Commission requested the Secretariat to prepare a study, within existing resources, that would identify specific topics and discuss the desirability and feasibility of the Commission preparing a legal text with a view to removing specific obstacles to international trade

10-43075

in the context of intellectual property licensing practices. It was widely felt that the study should establish the concrete needs and appropriate ways in which these needs could be addressed by a legal text to be prepared by the Commission. The study should also carefully identify the suitability and the scope of work to facilitate consideration of the topic by the Commission at a future session. It was also agreed that the Secretariat should consult with experts who had significant experience in intellectual property licensing, both from the public and the private sector, including relevant international organizations, such as WIPO, and consider addressing a questionnaire to States to assess the needs and any possible ways in which those needs could be addressed."

2. **Mr. Hughes** (United States of America) suggested that in paragraph 2, the words "a purely" should be changed to: "more properly viewed as an" since it had already been stated that the topic was at the intersection of intellectual property and contract law; in paragraph 3, the words "had every reason to have confidence" should be changed to "was confident" and that in paragraph 5, the words "those who rely on the licensing of intellectual property in their own commercial practices, and" should be added after the words "the private sector, including".

3. *The oral report on intellectual property licensing, as amended, was adopted.*

Finalization and adoption of a revised version of the UNCITRAL Arbitration Rules (*continued*)
(A/CN.9/XLIII/CRP.1/Add.5)

4. **Mr. Sorieul** (Secretary of the Commission) said that since the adoption of the decision reproduced in section C, paragraph 1 of the addendum to the draft report (A/CN.9/XLIII/CRP.1/Add.5), it had been pointed out that it would be worth drawing attention to the value of the UNCITRAL Arbitration Rules in the context of activities for the promotion of the rule of law. To that end, a new preambular paragraph could be added after the fourth preambular paragraph which would read: "*Mindful* of the significant contribution of the UNCITRAL Arbitration Rules in the strengthening of the rule of law in international commercial relations as well as in certain relations involving States" and, at the end of the seventh preambular paragraph, the following words could be added: "and to the continuous strengthening of the rule of law".

5. **Mr. Bellenger** (France) said that his delegation had had the impression that delegations had some hesitations about the idea of the Working Group taking up the issues referred to in part I, paragraph 5; he therefore proposed that the words: "should also undertake" should be amended to read: "could consider undertaking". His delegation was not in favour of referring in the draft decision to the strengthening of the rule of law since that issue was related more closely to domestic law.

6. **Mr. Tosato** (Italy) said that his delegation felt that the draft report should reflect the content of the discussion that had taken place; it was therefore surprised that amendments were being proposed that appeared to concern the substance of the discussion.

7. **Mr. Chan** (Singapore) suggested that consideration of the report should be deferred until the end of the following week so as to allow time for consultations. His delegation strongly disagreed with the comment by the representative of France about the rule of law which, it believed, was even more applicable to inter-State relations than domestic law since otherwise might would prevail over right and the strong over the weak.

8. **The Chairperson** said that, in view of the fact that document A/CN.9/XLIII/CRP.1/Add.5 had only just been issued, the Commission would defer consideration of it until the following week.

The meeting rose at 4.05 p.m.

United Nations A/CN.9/SR.917

General Assembly

Distr.: General
29 July 2010

Original: English

United Nations Commission on International Trade Law

Forty-first session

Summary record of the 917th meeting

Held at Headquarters, New York, on Thursday, 1 July 2010, at 10 a.m.

Chairperson: Ms. Sabo (Vice-Chairperson) ..... (Canada)
later: Mr. Wisitsora-at (Vice-Chairperson) ..... (Thailand)

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10-43377 (E)

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The meeting was called to order at 10.15 a.m.

Election of officers (*continued*)

1. **The Chairperson** said that the delegation of Japan, on behalf of the Asian Group, seconded by the delegation of Singapore, had nominated Mr. Wisitsora-at (Thailand) for the office of Vice-Chairperson of the forty-third session of the Commission.

2. *Mr. Wisitsora-at (Thailand) was elected Vice-Chairperson by acclamation and took the Chair.*

Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency
(A/CN.9/699 and Add.1-4, and A/CN.9/708; A/CN.9/WG.V/WP.92 and Add.1)

3. **Ms. Clift** (International Trade Law Division) said that the Commission had before it documents A/CN.9/WG.V/WP.92 and Add.1, which set out the draft commentary and recommendations of part three of the Legislative Guide on Insolvency Law, along with document A/CN.9/708, which set forth amendments and additions to that draft, and a number of other documents containing comments by States and intergovernmental and non-governmental organizations (A/CN.9/699 and Add.1-4).

Document A/CN.9/WG.V/WP.9

4. **The Chairperson** said that, if he heard no objection, he would take it that the Commission wished to adopt document A/CN.9/WG.V/WP.92, as revised by document A/CN.9/708.

5. **Ms. Clift** (International Trade Law Division) drew attention in particular to the expanded text proposed in the revised text for paragraph 26.

6. *Document A/CN.9/WG.V/WP.92, as revised by document A/CN.9/708, was adopted.*

Document A/CN.9/WG.V/WP.92/Add.1

7. **Mr. Boulos** (Egypt) suggested that, in the third line of paragraph 28, the word "may" should be replaced by "will", since, once a communication was recorded, it must necessarily form part of the record.

8. **The Chairperson** said that, to his recollection, "may" had been adopted as a compromise: in some countries, communications were not required to form part of the record. If the word were changed in that paragraph, it would also have to be changed in paragraph 243 (d).

9. **Mr. Cooper** (Observer for the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)) said that at the judicial colloquia it had been reported that in some jurisdictions there was concern about the status of court-to-court communications. The consensus seemed to be that where there were parallel proceedings in two jurisdictions, as opposed to joint hearings, recordings would be made in accordance with the rules of the courts of those jurisdictions. The original wording was therefore to be preferred.

10. **Mr. Lifland** (United States of America), supported by **Mr. Ghia** (Italy), said the issue was a domestic one, determined by each country. The wording should therefore be left unchanged so as to ensure the maximum flexibility.

11. **The Chairperson** said that he took it that there was no support for the Egyptian proposal.

12. **Ms. Clift** (International Trade Law Division) said that changes had been proposed by the Working Group following its review of the document. At the end of recommendation 242, after "members of that enterprise group", and at the end of recommendation 248, after "enterprise group", the words: "to facilitate coordination of those proceedings" should be added; and in paragraph 243 (c), the words "and claims" should be deleted.

13. **The Chairperson** said he took it that the Commission agreed to those changes.

14. *Document A/CN.9/WG.V/WP.92/Add.1, as revised by A/CN.9/708 and as orally amended, was adopted.*

The meeting was suspended at 11.15 a.m. and resumed at noon.

Draft decision on adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law (A/CN.9/XLIII/CRP.6)

15. **The Chairperson** drew attention to the draft decision contained in document A/CN.9/XLIII/CRP.6, which, once adopted, would be reproduced in part three of the Guide.

16. **Mr. Morán Bovio** (Spain), referring to the Spanish version of the text, said that the word "quebrar" in the third preambular paragraph might not be the most appropriate word for the English term "fail".

17. **Mr. Bellenger** (France), referring to the French version of the text, said that the expression "sujet de droit" in the fourth preambular paragraph should be replaced with an expression such as "entité juridique", which was closer to the term "legal entity" used in the English text.

18. **The Chairperson** suggested that the secretariat should be requested to adjust the French and Spanish versions of the text accordingly.

19. *It was so decided.*

20. **Mr. Redmond** (United States of America) suggested adding a new paragraph 5 along the following lines: "*Recommends also* that all States consider the implementation and use of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation."

21. **Mr. Morán Bovio** (Spain), welcoming the United States proposal in principle, said that the Practice Guide could not be "implemented" as such because it was not a text that gave rise to legislative initiatives; rather, it was intended to be used as a basis for negotiations between parties to cross-border insolvency proceedings. It might be better simply to draw attention to the Practice Guide or to recommend that States should take it into consideration where appropriate.

22. **The Chairperson** suggested that the wording of the proposed new paragraph should be based on paragraph 3 of General Assembly resolution 64/112, in which the Assembly recommended that the Practice Guide should be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings.

23. **Mr. Oh** Soo-geun (Republic of Korea) expressed support for the inclusion of an additional paragraph, provided that appropriate wording could be found. Perhaps it would be acceptable to refer to "use" of the Practice Guide.

24. **Ms. Leblanc** (Canada) said that her delegation supported the United States proposal but shared the concerns expressed by the representative of Spain. She proposed the following wording for a new paragraph 5: "*Recommends also* that all States continue to consider encouraging reference to and use, where practicable, of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation."

25. **Ms. Sanderson** (United Kingdom), supported by **Ms. Smyth** (Australia), agreed that it was important to take the opportunity to remind States of the existence of the Practice Guide. Her delegation favoured wording based on resolution 64/112, as suggested by the Chairperson.

26. **The Chairperson** suggested the following wording for the proposed new paragraph 5: "*Recommends* also that the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation continue to be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings."

27. **Mr. Redmond** (United States of America) expressed support for that suggestion.

28. *The draft decision contained in document A/CN.9/XLIII/CRP.6, as amended, was adopted.*

Possible future work in the area of insolvency law
(A/CN.9/582/Add.6, A/CN.9/691 and A/CN.9/709; A/CN.9/WG.V/WP.93 and Add.1-6)

29. **Ms. Clift** (International Trade Law Division) said that Working Group V, in its report on its thirty-eighth session (A/CN.9/691), had recommended that activity should be initiated on two insolvency topics: a proposal by the United States of America on the Model Law on Cross-Border Insolvency relating to the centre of main interests and the development of a model law on insolvency (A/CN.9/WG.V/WP.93/Add.1); and proposals by the United Kingdom (A/CN.9/WG.V/WP.93/Add.4), the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International) (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6) concerning the responsibility and liability of directors and officers in insolvency and pre-insolvency cases. The Working Group had also suggested that the secretariat might be requested to monitor work on cross-border insolvency in the case of large financial institutions. Switzerland had submitted a proposal in that connection (A/CN.9/709).

30. **Mr. Burman** (United States of America) noted that the proposals put forward in Working Group V on directors' and officers' liabilities, and that put forward by his own delegation on international insolvency law, had met with widespread support. His delegation supported the recommendations made in that regard.

31. **Mr. Schoefisch** (Germany) said that the responsibility and liability of officers was a matter of liability law rather than insolvency law, and therefore should not be a topic of discussion in the Commission. However, his delegation supported the United States proposal regarding the centre of main interests, and the possible development of associated principles.

32. **Mr. Morán Bovio** (Spain) said that his delegation fully endorsed the views expressed by the representative of Germany. It was difficult to determine the scope of the responsibility of directors and officers in general and in situations of insolvency in particular. It was not possible to consider the situation only at the time of bankruptcy, it would need to be considered over some indeterminate time frame prior to insolvency, during which the responsibility of directors and officers would also need to be considered, as being just as great as during insolvency. It would be difficult to determine the limits. However, his delegation saw merit in the United States proposal.

33. **Mr. Kuhn** (Observer for Switzerland) noted that his delegation's proposal for a study on insolvency affecting large financial institutions had not thus far generated sufficient support for inclusion in the Commission's agenda, and that the attendant policy issues were under consideration in other bodies. The proposal was for a study focusing on cross-border cooperation, as essential for the orderly resolution of such cases. The normal approach to such cooperation would be to conclude a treaty on insolvency measures, but that did not appear feasible at the global level, so that the study should look at alternative means. The study should be confined to technical issues. While policy issues were better dealt with elsewhere, such as in the Basel Committee on Banking Supervision, the Commission was the only body competent to consider the technical aspects, and had an important role to play in an issue of vital concern.

34. **Ms. Sanderson** (United Kingdom) said, with regard to the comments on directors' duties, that a company did not necessarily become insolvent on the day it made a formal declaration of insolvency. A company was likely to be effectively insolvent before any formal declaration of insolvency was made.

35. In reality the duty of the directors and officers to behave responsibly, and to have regard not only for the interests of shareholders but also of creditors, was all the more important as a company approached insolvency, even if formal insolvency proceedings had not yet begun. That meant that prior to formal insolvency directors and officers should take account of the interests of creditors, and that it was a matter that the Commission could usefully consider, including by defining the point at which a business became insolvent and by setting limits on the actions of directors, in the interest of better behaviour within the business community.

36. **Ms. Smyth** (Australia) said that her delegation supported Working Group V's recommendations that work should proceed on the United Kingdom and United States proposals; in that regard, she endorsed the remarks made by the representative of the United Kingdom. The liability of directors and officers was a particularly important topic, and constituted a fundamental aspect of insolvency frameworks. Companies should be encouraged to enter into insolvency administration at an appropriate juncture if such frameworks were to be successful.

37. **Mr. Cooper** (Observer for the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)) said that the importance of restructuring had never been greater. Most countries had legislation providing for the restructuring of financially troubled companies. Effective use of such laws required insolvency proceedings to be started as early as possible, when more options were available. In practice, it was often left to creditors to commence what were liquidation proceedings, because directors had failed to act. One highly undesirable development was that directors "forum shopped", commencing proceedings in jurisdictions with less onerous requirements. The issue of directors' obligations when a company was becoming insolvent certainly fell within the purview of the Commission.

38. **Mr. Mokal** (World Bank) said that while the World Bank supported both the United States and United Kingdom proposals, it had a particular preference for the latter in the context of its work in developing and emerging markets. In virtually all the

jurisdictions in which the World Bank was engaged, the issues touched on by the representative of INSOL International were key. It was essential for legal systems to create incentives for directors and officers to take the right steps at the right time, and the proposals on liability put forward by the United Kingdom were highly relevant. It would assist the World Bank in its own work of suggesting improvements in legislation on liability if the Commission laid down standards on international best practice in that domain.

39. Regarding the Swiss proposal, it was crucial to ensure coherence and harmonization in the treatment of bank resolutions. However, the World Bank had reservations about the timing of the proposal, and the appropriateness of the Commission as a forum.

40. Regarding timing, in many jurisdictions insolvency of enterprises was dealt with by a specialist government department, whereas bank resolutions were dealt with by the banking regulator, typically the central bank. Yet central banks were, and in the immediate future would remain, heavily engaged in stabilizing the financial and banking sectors. To request their participation in consideration of bank resolutions would be an excessive demand. Moreover, other institutions, the World Bank and the International Monetary Fund (IMF) in particular, were seeking to ensure coordination among banking regulators, identify best practice and formulate guidance. For the Commission to embark on consideration of the topic at the current juncture might well prove an obstacle to their work. Thus, while the topic was important, and the Commission had a role to play in due course, the Swiss proposal was inopportune.

41. **Ms. Liu** Yan (International Monetary Fund) said that IMF supported the proposals put forward by the United States and the United Kingdom. Regarding the Swiss proposal, there was a need for international action on cross-border bank insolvency arrangements. However, several bodies were engaged in that area, including IMF itself. The Commission, though, had a comparative advantage in many aspects, including private law issues, and could make an important contribution to the development of an international framework for cross-border bank resolution. The various proposals being put forward in different bodies were still at an early stage, and it would be premature to delineate the Commission's role. IMF, and other bodies, were about to submit proposals to the Group of Twenty. Further discussion of the principal features of an international resolution framework was necessary to determine the way forward.

42. **Mr. Ghia** (Italy) said that his delegation supported the United Kingdom and United States proposals. Misconduct and malpractice by directors and officers had an international impact, and had resulted in thousands of redundancies worldwide in recent years. Guidance by the Commission on insolvency, on when and how to replace company directors and officers, and on restructuring, was of vital importance in international insolvency and in avoiding forum shopping.

The meeting rose at 1 p.m.